UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)
vs.	) Case No. AU-23-CV-00853-DAE
GREG ABBOTT, in his capacity as Governor of Texas, and THE STATE OF TEXAS, Defendants.	) Austin, Texas) February 22, 2024

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TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE DAVID A. EZRA
SENIOR UNITED STATES DISTRICT JUDGE

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(Thursday, February 22, 2024, 9:08 a.m.)

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THE CLERK: 23-CV-853, United States of America versus Abbott, et al.

THE COURT: Good morning to all of you. So we are here this morning to -- and I expedited this because the State is apparently concerned about the dates.

So we're here on a joint motion to continue dates. Would counsel like to make their appearances, please, for the record.

MS. KIMBALL: Good morning, your Honor. I'm Kimere Kimball. I'm here today from the Department of Justice. With me is Mary Kruger and Landon Wade from the U.S. Attorney's Office, and on the phone we have Brian Lynk, Andrew Knudsen, and Brian Harrison and Angeline Purdy also from the Department of Justice.

THE COURT: Yeah, they're not going to do any -- make any statements; they're just going to listen?

MS. KIMBALL: That's correct, your Honor.

THE COURT: All right.

MR. BRYANT: Your Honor, David Bryant on behalf of defendants from the Attorney General's office. I have with me Jonathan Stone, Munera Al-Fuhaid, Ryan Walters, Jake Przada and Kyle Tebo, all from the Texas Attorney General's office.

THE COURT: Okay. My goodness, for the first time in

a long time we're missing your friend with the beard over here in the corner.

UNIDENTIFIED SPEAKER: Mr. Sullivan, your Honor? Yeah, he's not here today.

MR. BRYANT: But the Office of the Governor is well represented.

THE COURT: I'm sure they are. But, I mean, I see him all the time. I feel like, you know, as many state cases as I've had in my career, that I always see him. He's a very, very nice man, I think, and I -- it's enjoyable to have him here in court because he'll -- occasionally I'll allow him to make a comment or something.

All right. Let's get down to business.

So we're here to -- on this joint motion. Now, I think we need to clear a few things up. Let's get some dates out on the record that have occurred in this case.

This complaint was filed by the United States way back on June 24th of '23.

On September the 6th of '23, I granted, after a hearing, a request for a preliminary injunction. There was an appeal filed on that day, on September the 6th.

I mean, actually the day I entered it, the appeal was filed.

So the State was really trying to move it along.

On October 23rd, the United States filed an amended

complaint. The defendants, to my knowledge -- I don't check the docket every day so this may have happened and I'm not aware of it. But to my knowledge, the defendants -- the State has not responded to that complaint, have not filed an answer.

MR. BRYANT: Your Honor, we did respond to the complaint as directed by the Court on December 6th, 2023, with a --

THE COURT: I'm talking about the amended complaint. I'm talking about the amended complaint.

MR. BRYANT: The amended complaint.

THE COURT: You did answer the amended complaint?

MR. BRYANT: No. We did file motions to dismiss.

THE COURT: Okay. All right.

MR. BRYANT: Those were fully briefed by early January and are still pending.

THE COURT: Right. So I was correct. There has been no answer to the amended complaint, which is the operative complaint in this case now.

MR. BRYANT: That is correct, your Honor. Our time to answer hasn't come yet.

THE COURT: No. That's right. I'm not criticizing you for not answering. I'm just trying to get the record straight. The operative complaint is the amended complaint. It subsumes the original complaint. And so unless I grant the motion to dismiss in whole and dismiss the whole case, the

Government, State Government has to file an answer. That hasn't been done.

MR. BRYANT: That's correct, your Honor.

THE COURT: All right.

MR. BRYANT: And, of course, the Court could grant the motion to dismiss in part which would have a big effect on what we need to do in discovery.

THE COURT: And we're going to get to that, and I'm going to do that as quickly as I possibly can.

All right. On October -- I'm sorry. On January the 19th, this Court held a status conference, and I set deadlines and a trial date. That was -- that resulted in the -- after the hearing, the defendants filed an appeal with the Fifth Circuit, which they construed as a writ of mandamus, to attempt to require me to vacate that trial date.

As we all know, there was a flurry of opinions out of the Fifth Circuit. I really have never in my career seen anything quite like it, ever, either sitting as a circuit judge by designation in the Ninth Circuit, which I do three times a year, and have for 30 years, or as a trial judge.

I've never seen a flurry of -- and I have received calls from judges, circuit judges and district judges from all over the United States, telling me the same thing. They just really have never seen anything quite like that flurry of opinions.

And that's fine. I mean, that's the Fifth Circuit's right. They can do -- they can write what they wish. That's absolutely -- I have no control over that. I have no right to suggest that I do and I don't. And I certainly have no -- absolutely no personal animus against any circuit judge in the Fifth Circuit.

In fact, many, many of those circuit judges, including a few who were in the dissent, are friends -- well, one that was in the dissent, are friends of mine and have been. And, in fact, we serve on the same committee together. Judge Smith, who's a fine guy, and I have a great deal of respect for.

The one concern, of course, that I have is that -- and this was, I think, the reason -- and it's now become the fodder of public comment where people are actually writing articles about it -- is the fact that we have this situation where Judge Ho mostly, but a little bit in Judge Oldham, but mostly Judge Ho, are writing these advisory opinions on the merits of the case, and it is concerning. Not for me, I don't care, I don't pay any attention to it at all.

Federal judges are not supposed to be writing advisory opinions. It's prohibited. That's part of Article III. The issue before the Court was whether I was right or wrong in setting a trial date, and whether it was mandamus-able.

And that went to the issue of timing, basically. People getting ready, do they have time to get ready; not the

merits of the case.

The merits of the case was not what was in front of the Court in mandamus. It's very, very reminiscent of another situation I had, unfortunately, with Judge Ho, and to a degree, although she didn't write an advisory opinion, I have to say, let's see, Judge -- she was a chief judge, Judge Jones.

I should know that, because Judge Jones' father was my wife's family physician in San Antonio. Wonderful man and an excellent physician, by the way.

In any case, I noted that Judge Jones did not join in any of the dissents in this case, either.

But Judge Jones and Judge Ho excoriated me in the fetal tissue case, fetal burial case, we call it, because I had a -- it was a totally unrelated matter that had nothing to do with the merits of the case. Nothing, zero to do with the merits of the case.

There was a question about whether the Catholic bishops had to turn over records relating to the number of fetal tissue burials that they would take in the case, and I ordered that they turn over a limited number of records. And the lawyers came to me and asked me if I couldn't possibly expedite my ruling and essentially get it to them so that they could work over the weekend, because the trial was to start, you know, the following week, early.

And it was Father's Day and I wasn't all that

thrilled. I'm a father of three daughters and I have seven grandchildren and I like to be home for Father's Day.

But I did what they asked and I got my order out. Well, I got excoriated by Judge Jones and Judge Ho for making these Catholic lawyers and so forth work over Father's Day.

Well, the fact of the matter is, of course, they had asked me to do exactly that. And I think the implication was that I was somehow, I don't know, anti-Catholic, I don't know. It doesn't make any sense, because I certainly -- anybody who knows me knows that I am absolutely not anti-Catholic. The opposite is true for reasons I won't get into here.

But I happen to be Catholic.

In any event, in his concurrence with Judge Jones, Judge Ho decided to tell us that the -- and he says it flat out, that the fetal burial law is perfectly constitutional. That went right to the heart of the merits of the case, one part of the case. Absolutely right to the heart -- and it was totally gratuitous. It had nothing to do with what was before the Court.

And, apparently, Judge Jones -- Judge Ho -- to her credit, as I say, Judge Jones did not join in that.

Judge Ho did it again here. I've got it right in front of me. He told us why, in this opinion, in his view, the invasion clause of the Constitution allows the governor to do what the governor has done.

Now, that goes to the merits of the case.

And then, apparently, here's an article that was written on the 20th of -- February 20th of this month. It says, *"Fifth Circuit keeps Texas Anti-Drag Law on Ice as State's Appeal Proceeds.* Judge -- this is the article -- Judge James Ho, though, wrote that, "Texas should immediately be allowed to enforce the law despite the district judge's ruling that the law is unconstitutional." And he apparently gave his own reasons on the merits.

Now, it's a problem because Judge Ho could find himself recused from some of these cases if he isn't careful. That's what it's going to boil down to. Because it's totally unfair to the opposing party to have the judge weigh in on the merits of the case in a matter that doesn't go -- now, he may disagree with me. He may think that he has every right to go to the merits, and he may disagree with me that his comments don't go to the -- even though he tried to fashion them as such, this was a -- in this case, this was a mandamus. That's all it was, a mandamus.

If you look at Judge Douglas's opinion, joined in by the majority of the judges who said I did nothing wrong, she didn't go to the merits. She discussed solely and only the issue of what was before the Court. And even Judge Willett didn't, you know, opine on the merits.

Now, as I say, Judge Ho is a very bright jurist.

There's no question about it. And, you know, he is entitled to do whatever he wants to do. It's not up to me. But it is burdensome on this case to have a situation out there where we already have a judge who's decided in his own -- in his writings -- he's citing to us, the Federalist Papers, Madison.

Well, you know, I have been looking at Federalist Papers, too. I'm something of an academic. I've taught law school, federal courts and advanced civil procedure, for 38 years. I'm not unfamiliar with the library, I can assure you, and it is what it is.

Now, some people would say, *Gee, judge, you know, you're making these statements. Judge Ho is going to come after you or this may put you in a bad way with the Fifth Circuit.* I don't think so. The Fifth Circuit judges are distinguished judges.

Oh, and by the way, now that -- before I forget to mention it, because some of you may not know about the fetal burial case. I actually agreed with Judge Ho in the end that the state law was constitutional, and I did that despite the fact that the Tenth Circuit at the time, which was the only decision on exactly the same law, had ruled that it was flat out unconstitutional.

That case went to the Supreme Court, and a year and half or so after I made my ruling, the Supreme Court reversed the Tenth Circuit and found the law to be constitutional, as I

had.

So I agree with Judge Ho. He and I agree on many issues. And he is a very bright judge. He's a very -- I knew of him long before he was, you know, a circuit judge. Very bright, very capable, but he's -- he's just going to get himself recused from cases, because if a party on the other side says, *Wait a minute, we can't have a judge on our case that's already decided the case and we haven't even* -- somebody made the argument, it may have been Judge Oldham, that I had made a decision before hearing argument.

And then I thought to myself, yikes, the other dissent is much worse. It's a decision on the merits before hearing argument. Either hearing argument in the -- they -- there's been no argument in the appeal, the en banc appeal. That hasn't been argued yet, let alone my case. And it also boils over into SB4.

So in a situation like that, the chief judge might have to refer it to the chief justice of the Supreme Court to have another circuit hear whether he should be recused.

So, I mean, it's a shame because he's a very bright guy. He's very capable. He is certainly entitled to his opinions, but it comes -- there comes a time when somebody has to step up to the plate and say this is just not a good thing.

Issuing advisory opinions, which these were -- I mean, I -- he may try to suggest that this one on this isn't, but it

was. But nonetheless, clearly the one in the fetal burial case was. He just flat out said the law's constitutional. How do you -- what is that? That's called an advisory opinion.

We hadn't even tried the case. The discovery dispute had nothing to do with the merits. And, in fact, the bishops weren't even party to the case, weren't even party to the case.

Anyway, I'll leave that as it may.

Now, I could deny this motion, because in spite of the fact that one of the dissents said something about my being ordered. There's no order anywhere in -- believe me, I looked. There's no order anywhere in the multiple decisions that have been -- that were issued, multiple opinions that were issued in the -- from the en banc court on the denied motion for mandamus that compelled me to do anything.

There are a number of suggestions. Judge Willett makes a suggestion, but not an order.

And so I could deny this motion, but the question is; why would I? I want the parties to have every opportunity, and I always have, to properly and absolutely be thoroughly prepared.

I was under the impression that given the lengthy amount of time we've had and the fact that Texas had always pressed to move quickly, I mean, look -- I mean, everything that Texas has filed has been like either on the day of or the day after the ruling.

Texas has made every effort to move quickly. And I had arguments in front of me in this case early on where Texas wanted to resolve this quickly.

It was only when the thing went en banc that all of a sudden Texas decided *Maybe now we want to move slow because maybe we'll get a favorable decision out of the en banc court that might do something or other.*

I don't know, but there was never, ever any type of -- there are too many conspiracy theorists floating around these days. There was never any conspiracy by me to try to usurp the authority or power of the Fifth Circuit. It's the most ridiculous thing I've ever heard.

First of all, no district judge, here or anywhere else, can usurp the authority of the United States Court of Appeals. It doesn't happen. It can't happen. And it was never, ever my intention to attempt to do something so stupid.

I was just trying -- as Judge Douglas pointed out, I was just trying to get this thing done as quickly as possible, because I have a lot of other things on the plate, including the SB4 matter, which I'm trying to get out as quickly as I can for the benefit of the lawyers because they want me to get it out quickly.

Now, I'm sure that when I get that out, somebody's going to suggest that I, in some way, shape or form, rushed along my opinion. When you read my opinion, you will see it

wasn't rushed out. My job is to do a thorough job of getting an opinion that will thoroughly and correctly answer and respond to all of the arguments made by both sides, period.

And then that, as I said before, as I said during the SB4 hearing, that will go on appeal, and I firmly expect that will go to the Supreme Court. It has to, because of the nature of it, and the arguments being made by the State and the federal government. Absolutely, I think that one will go.

So I'm not trying to rush anything. There's no need to rush anything.

Oh, one other thing. Early on in one of the opinions, I think it was my friend Judge Willett, who I have a great deal of respect for, and I've said so in writing, wondered why, if I was so interested in -- and so -- in this case, and believed so thoroughly in my opinion, why didn't I order the State to completely remove the buoys from the river instead of just ordering them to go to the bank?

Well, I'll tell you why, and I think the lawyers understand this, although apparently some of the appeals court judges weren't carefully informed of this, which is not their fault.

I knew because in virtually every case that's decided in this courthouse involving the State of Texas, they immediately seek a stay and an appeal if they get an unfavorable ruling. I can't remember the last one that that

didn't happen in.

I did not want to be in the position of ordering the State to move all of that equipment, that buoy, and put it on the bank. Not against -- not in the river along the bank, but to pull it out of the river at great expense to the taxpayers in the state of Texas, only to have the Fifth Circuit issue an order.

Now, you talk about a judge trying to clip the Fifth Circuit? That's what I could have done. I could have ordered the governor immediately to remove it that day, get it out of there, start moving it. Now, he would have run to the Fifth Circuit, of course, and maybe an order would have issued, but I didn't try that.

Why would I do that? I understood, and I appreciate, and I respect the appeals process. I participated in that process my entire career as a federal judge, both as a district judge and sitting by designation on the Court of Appeals, and I have great respect for the Fifth Circuit and the judges there.

So this is not a criticism of the Fifth Circuit or the judges there and I hope that the media understands that. It's a concern with some practices that have been going on by a few judges. I'm not painting the entire Fifth Circuit with a broad brush.

But I -- and then what if the Fifth Circuit for whatever reason couldn't get to it, or they -- you know, or the

administrative stay wasn't issued; the thing would be sitting out there -- and then if the Fifth Circuit reversed either the three-judge panel -- the three-judge panel, as you know, affirmed by the State, I could have at that point run and ordered the thing out. I didn't. I got criticized for that.

I didn't. Why? Same reason, because I knew that there would be a request for an en banc, and I waited until that was resolved, and -- because, again, I was concerned that, for them to pull that thing out, sit it on the bank, and then if I were to get reversed or the Fifth Circuit were to make some other order, they would have to reassemble everybody and put it back in the water, which would cost a tremendous amount of money to the state taxpayers.

Why do that? Had nothing at all to do about my belief in the correctness of my ruling. If I didn't think my ruling was correct, I certainly wouldn't rule that way. Why do that?

Believe me, you know, when I ruled in favor of the State of Texas in the fetal burial case, I was getting some pretty substantial criticism from the other side of the fence, from the left, some kind of a state lackey or something, when -- somebody called me -- Governor Abbott's lackey. Honestly. Honestly. And there were -- and it was worse. I'm not going to go into the details.

I get criticism. You know, no matter what you do, they come after you. No one, when they come into federal

court, is entitled -- entitled to win the case. What they are entitled to is to have their arguments heard, the Court carefully and thoroughly review their arguments and the evidence and the law, and make a thorough and complete ruling, which one side or the other is not going to be happy with.

And then we have a, I call it almost a sacred appeals process, where they can then seek additional relief from the Court of Appeals, and then, ultimately, the United States Supreme Court.

And that's the way it should be. And this business of issuing half rulings on the merits before the case is even tried or the merits -- it's just not a -- it's not consistent with that philosophy. Federal judges are judges. We are not legislators. We're judges. And so we're heavily -- let me just leave it there. I'll leave it there.

All right. Your motion, by the way, is granted. So I am looking at -- I don't have -- you know, just give me a trial date. I have to pick a date which is going to be able to fit on my calendar.

You know, I know that it looks like all I do -- and in fact, sometimes it looks that way to me -- is handle these big state cases involving these monumental issues.

The fact of life is I handle all kinds of cases here. I've got a trial next week; an individual claims they were discriminated against by a -- by a car dealership and they're

claiming damages under Title VII. That's a pretty typical kind of case. Nobody cares about that case except the people who are involved in that case, and they care a lot. And because they care a lot, so do I. I treat every case with the same importance.

I had a case that was going to -- that did settle where somebody slipped and fell at a Dollar General. Now, on the spectrum of national importance, probably these cases are at the opposite ends, right? But for the person who slipped and fell, I would think they would think that was a pretty important case, all right, and I treat it as such. But it settled. But I would have had a trial here.

So I've got a lot of the kinds of trials that Judge Pitman and I have on a regular basis and that's the way it goes.

So I'm looking at Tuesday, April the 16th; and we can then fit in the other deadlines, which I'm going to leave to the magistrate judge, and those include the disclosure of expert witnesses by the United States and Texas, the close of fact discovery, disclosure of expert opinion reports, close of expert discovery, proposed findings of fact and conclusions of law, pretrial submissions, including identification of exhibits, witnesses and who may or will be called at trial.

We usually don't have a lot of witnesses in these cases, but we may; witnesses whose testimony expected to be

presented by deposition and estimated probable length of trial.

And any objections to any pretrial submissions, we will -- that will be set by the magistrate judge. Because -- who are you?

MR. STONE: Your Honor, my name is Jonathan Stone. I'm here on behalf of the State.

THE COURT: Oh. All right. Have you been here before, Mr. Stone?

MR. STONE: Not on this case, your Honor.

THE COURT: Oh, okay. See, I'm pretty good with faces. I didn't remember you on this case.

Yes, sir?

MR. STONE: Your Honor, we've been in communication with the federal government about the discovery schedule in this case. And at least from the State's side, a trial date in April is simply not feasible because of the experts in this case, your Honor. In order to get experts, we have to go through a whole process --

THE COURT: When is the en banc supposed to be heard?

MR. BRYANT: Your Honor, I believe that's May 24th.

THE COURT: Oh.

MR. BRYANT: Or, I'm sorry, it's in May.

THE COURT: It's in May. That's when the argument is?

MR. BRYANT: Yes, your Honor.

THE COURT: I don't want to get accused again of

somebody going, *Oh, he's back at his conspiracy. He's trying to cut off the Fifth Circuit. He's trying to rob them of their jurisdiction.*

MR. STONE: Yes, Your Honor.

THE COURT: My problem is, I am not available in the latter half of -- I've got something else that has to be done, and I'm not available in the last half of May and I'm not really of the opinion that this thing ought to hang around until June or July.

MR. STONE: Your Honor, we were thinking more of September, a September date.

THE COURT: September?

MR. STONE: September, your Honor. We need time to --

THE COURT: No, that's not going to work. September will not work.

MR. STONE: Well, but, your Honor, there's at least five experts that they've identified so far --

THE COURT: Counsel, let me tell you something. I am not afraid to run afoul of somebody accusing me of rushing this along, okay. September is just way too long. I have complicated civil trials, complicated civil trials who have been going less than this that have a less-generous schedule than I'm about to give you, because we have to fit things in.

September is not going to happen. I don't have the time in September, and we're not pushing this until, you

know -- it's just not happening.

MR. STONE: Well, your Honor, if I could just elaborate just briefly on why it's such an issue in terms of the experts in this case.

Let me give you a specific example with respect to the historians. So they've identified a historian who's going to testify about whether the Rio Grande has been used commercially in this area as a navigable water.

THE COURT: Yes.

MR. STONE: We're going to have to respond to that, and so we've been talking to other historians and historical outfits. They're going to need to go down and look at archives. They might need to go to Mexico and translate documents from Mexico. They're going to have to actually evaluate to determine whether or not the Rio Grande in this region has been used for commercial purposes historically.

It's going to take a little bit of time. And on a trial schedule in April or even May or June, there's simply not enough time --

THE COURT: Look, I will try to move the trial date past April, okay? And I told you May is probably out. But June is not out. And, look, I've been a lawyer for 53 years or 2 or 3 years. I was a trial lawyer before then. I used to get experts ready in cases as or more complicated than this.

You have months under my schedule, months. I don't

know who your experts are, but there's absolutely no justification for that kind of delay.

MR. BRYANT: Your Honor, I'd like to provide the Court with a little bit of background that the Court hasn't heard yet, which is this motion that the Court has granted was essentially not only to vacate the current schedule but to allow the parties to confer on a mutually agreeable schedule.

We started that process yesterday, and although we didn't have agreement on every little specific detail, we generally agreed, both sides feel it would be appropriate to have a process that leads to a trial at the beginning of August or whenever the Court can find time thereafter.

So I'm not trying to say the Court can't order whatever the Court wants to order --

THE COURT: Look, I could order we go forward in March. That would be a vindictive, inappropriate thing for me to do.

I would not do that. I would never do that. I've never behaved that way as a judge and I would hope no federal judge would act that way just because they, you know, came out of -- they were successful in not being mandamused that they say, *Okay, well, now, I don't have an order from the Fifth Circuit, I'm just going to go ahead and do what I want to do.* I told you, I don't operate that way and I never have.

I am more than happy to give you a reasonable amount

of time, but there aren't that many experts in this case. The issues in this case have been known for several years. This is not new. This is absolutely not new. The issue in this case about the navigability of the water has been -- was a central issue from the date that this complaint was filed and even before that.

And to suggest that -- and I'm going to give you an early motion to dismiss date, by the way.

But the -- to suggest that somehow by moving the trial date from March, April, May, to June or July, that this Court is somehow rushing you and not giving the experts plenty of opportunity, look, I, in my wildest dreams as a federal trial lawyer, would have loved that kind of latitude.

I can tell you, I have gone into courtrooms where the judge sat there with a schedule and said, "You're trying it on this day. Here's when you're going to disclose your experts, this, this, and this," and the lawyers looked at each other, we looked like the old comedian Jerry Colonna with our eyes popping out of our head.

And when we stood up and said, "But Judge," he said, "Do you have a problem? Take it to the Court of Appeals," and walked off the bench.

Now, that's not the way I act, in spite of the fact that I was accused of that.

Give them a July trial date. That's it. That's long

enough. That's way long enough.

MS. KIMBALL: Your Honor, one of our primary experts is not available in July. We could make -- we could make through May work, and then one of our experts becomes unavailable until the end of July. So we could make through the end of May work or we could make August work. And I understand the Court said that the end of May is not --

THE COURT: Well, I could do the end of June.

MS. KIMBALL: So June and July are the months where our two primary experts have overlapping unavailability.

THE COURT: They have a problem. Do you even have experts?

MR. BRYANT: Yes, your Honor. We anticipate between us --

THE COURT: I mean, I was told --

MR. BRYANT: -- ten experts or more.

THE COURT: I was told that you had experts way back when we had the first hearing in this case. What have they been doing all this time? Nothing?

MR. BRYANT: Your Honor, we were awaiting the initial disclosures, the initiation of normal discovery in this case. The plaintiffs typically do that. There was no discussion about discovery --

THE COURT: So you were doing basically what I -- you were doing basically, Counsel -- excuse me, I didn't mean to

talk over you. But you were doing basically what I was doing, and that was waiting -- I was waiting for the Fifth Circuit, you were waiting for disclosures. And --

MR. BRYANT: And then we also had a First Amended Complaint, which added a new count.

THE COURT: It does.

MR. BRYANT: And then we briefed the motions to dismiss.

So that's -- ultimately, the result is that discovery on the merits only commenced in 2024. Both sides have exchanged discovery requests.

We're working, we intend to keep working, but the nature of the case and schedules is such that it'll take some time.

What we think we can do, all parties, confer together and come up with a proposed schedule for -- that we agree on for the Court's consideration. The Court can do whatever the Court wants to do with it.

THE COURT: Well, I'm the one that has to give you the trial --

MR. BRYANT: In a short time, we can do that.

THE COURT: I'm sorry, I thought you had finished.

I am the one who has to give you the trial date. The magistrate isn't going to do that, you know, because the magistrate doesn't have my calendar in front of him or her.

Who's the magistrate in this case?

THE CLERK: Judge Howell.

THE COURT: Okay. He does not have my calendar in front of him.

But nonetheless, you know, as Judge Douglas pointed out in her opinion, I have a duty and an obligation under Fifth Circuit law to move this case forward.

You have to remember, there are people who agree with the position taken by your client, Counsel, in this case, and believe this thing should be resolved in your favor right now.

There are people who agree with the United States' position and the buoy is still out there. And there are state -- I don't know if the state DPS has these boats that go up and down the Rio Grande -- I think they do -- and so does the customs and border protection.

And I just, you know, am so hopeful that -- you know, I'm not so worried about them running into the buoy itself, because it's big and it's orange and it's -- you know, you can see it. But at nighttime, if you're chasing down someone or you're not -- you know, in the middle of a pursuit, let's say somebody's trying to cross the river or they see somebody they think has got some drugs or whatever coming across that river and they're chasing them, you've got these big concrete buoys that sit out many feet -- we don't need to argue the merits of that -- sit out many feet away. I've seen dozens of pictures.

And when the river is a little lower, you can see them better. But at night, not so much.

But when the river is higher, you can't see them. But they're just inches below, and those boats, even though they're low draft, are capable of whacking into one of those barriers, and we could lose some lives.

That is concerning to me. It is concerning to me. So I don't want to be, kind of, sitting on this case. And if the Court of Appeals ultimately rules in this case that that's okay, they can just be out there, and if somebody gets injured, at least I know that I didn't sit on the case and it wasn't my decision that allowed the thing to be out there.

So there are concerns on both sides, and that concern, you know, some people call that a hazard to navigation.

MR. BRYANT: Your Honor, I appreciate you bringing that up and we'll be sure and address it at trial. My understanding is the boats don't go on the river at night.

THE COURT: I don't think that's entirely true.

MR. BRYANT: Well, we'll present the evidence. And, of course, the United States --

THE COURT: All right. They may have changed. They may have changed. But I used to sit --

MR. BRYANT: It's rare if it happens.

THE COURT: I used to sit in Del Rio and we would go down by the river and I saw boats on the river at night.

MR. BRYANT: I'm referring to the law enforcement boats.

THE COURT: I'm talking about law enforcement. But private boats, too. I'm not talking about Lake Amistad now, I'm talking about the Rio Grande.

MR. BRYANT: Well, we'll be happy to address that with evidence.

THE COURT: But even during the day, if it's high tide, you cannot see that, those darn things. I mean, I've seen all kinds of pictures. It is what it is. This isn't an advisory opinion. We had a hearing on this. You can't see 'em.

Now, whether that makes a difference to the overall strength of the government's case or your case is a whole other matter. That is not the big issue in the case. Those are not the big issues in the case. They are issues but not the big issues.

All right.

MR. BRYANT: Your Honor, the defendants share the desire to move expeditiously to the trial of this case. It would help us a lot if the Court -- understanding the Court has a lot of other demands -- when the Court gets a chance, if it could review and rule on the motions to dismiss --

THE COURT: Oh, no, you're definitely --

MR. BRYANT: Then we'll get an answer and then we will

know better what we have.

THE COURT: As I said, you're going to get an expedited date on that, Counsel.

MR. BRYANT: Thank you, your Honor.

MS. KIMBALL: I just want to make clear, we can be prepared to go to trial in April or May. June and July are just a little bit problematic. But we could go any time in April or May or starting July 20th.

THE COURT: No. All right. Let's give them a trial date in early August.

THE CLERK: August 6th.

THE COURT: By then maybe you'll have your en banc opinion from the Fifth Circuit on the -- on this case and maybe they'll resolve it all and maybe we won't even have to have a trial. You know, I don't think so, but --

MR. BRYANT: Your Honor, I think we better go ahead and get our schedule, do our discovery, and proceed on the assumption that there will be a trial August 6th.

THE COURT: Counsel, I could not agree with you more. And that's why the suggestion that I was somehow trying to usurp the Fifth Circuit's authority and beat them to the punch and somehow deflate their ability to rule on the merits was so absolutely off point; let me put it that way.

Everybody in this courtroom agrees that regardless of what goes on with the en banc, we still need a trial on the

merits.

Am I correct?

MR. BRYANT: I don't personally understand --

THE COURT: Your colleague over there was shaking his head yes. So August the 6th, all right.

MR. BRYANT: Very good, your Honor.

THE COURT: Is that all right with you?

MS. KIMBALL: Yes, your Honor. Thank you.

THE COURT: All right. Boy, I'm going to have people coming after me on the other side now that I caved to the State. I didn't cave to anybody. I did the right thing here, I think, under the circumstances.

We have this -- see, this is what a lot of circuit judges do not understand. We have this back-and-forth between counsel and the judge. When you read a cold transcript, it looks like the judge is knifing the counsel.

Do you feel like I've knifed you today?

MR. BRYANT: No, your Honor. I seem to be intact.

THE COURT: Or disrespected you? Or treated you unfairly today?

MR. BRYANT: No, your Honor.

My question is whether it would be appropriate for both of the parties to continue and complete the process of coming up with some suggested or proposed interim deadlines that lead to a August 6th trial and submitting those.

THE COURT: We're going to treat this the same way we treat a case, one of our patent cases or one of the other cases that I handle.

I will agree to your proposal to -- I'm going to use proposal twice, which is not a good thing. I'm going to agree to your proposal that you and the United States attempt to work out a proposal on all of those dates. Except for the trial date, the trial date is firm, okay?

MR. BRYANT: Very good, your Honor.

THE COURT: And if there is any disagreement between the -- I keep saying the State. Is that all right?

MR. BRYANT: Yes, your Honor.

THE COURT: Between the State and the federal government on this, the United States, then that will be referred. You need to let me know, and that will be referred to Judge Howell.

So if you come to an agreement, you need to -- on all of the dates, submit those in the form of a proposed order to me, a proposed order to me, a joint proposed order to me, and then as long as I look at it and it doesn't look silly, which I doubt, I will approve it.

If there's a disagreement, then we have to have Judge Howell intervene, and then if somebody's unhappy with Judge Howell's decision, then you can always appeal it to me.

How long do you think you need to -- we have some

lawyers in D.C. and you guys are all kind of here in Austin.

MR. BRYANT: In order to prepare both a joint order and reach an agreement, I think we can do that within a week.

THE COURT: A week?

MS. KIMBALL: Yes.

THE COURT: Let me give you a week and a half.

THE CLERK: March 6th.

THE COURT: Give them a week and half just in case somebody gets tied up.

March the 6th, is that okay?

MR. BRYANT: Very good, your Honor.

THE COURT: All right. So you've got an August the 6th trial date. By March the 6th, you will attempt to get to me a joint agreement on discovery deadlines. And if you can't, then we'll go from there with Judge Howell.

Yeah, ma'am?

MS. KIMBALL: Does the Court want a pretrial conference? And if so, should we set a date for that so that we have it for the --

THE COURT: No, not in this kind of case. I mean, I've already had hearings in this case, you know, which is -- I mean, pretty big hearing in this case, so it isn't like I'm not aware of what's going on here.

Okay. Let's give them their date for the hearing on the motion to dismiss, and I want it sooner rather than later.

THE CLERK: You have March 19th.

THE COURT: March 19th. We're going to do it March 19th, okay?

I want to be very careful. The reason I asked you when the en banc hearing was, not so that I could come up with some conspiratorial ruling here, but I didn't want to step on or have some circuit judge come back and tell me, *Well, you know, he set this thing the day of the en banc argument just so that he would deprive the State of Texas of their lawyers.*

I don't know. It isn't March 19th. We agree that that's not a date for the en banc hearing, right?

MR. BRYANT: Yes, your Honor, that's not the current schedule.

THE COURT: All right. So you were supposed to be here anyway. That was when we were supposed to start the trial before I basically granted Texas' request for an August date. So people should be available, I would hope.

I don't think the motion to dismiss is going to take all that long, really. I would say an hour, hour and a half, maybe, for argument. I'll give each side about 45 minutes. That's a lot more time than you get on appeal.

I don't know about the Fifth Circuit, but in a complex case like this, in the Ninth Circuit you get 25 minutes a side. I know because I've got one coming up. I'm sitting in -- where am I sitting, Portland?

THE CLERK: Portland?

THE COURT: Oh, San Francisco. I'm sitting in San Franciso in March. And I've got a blockbuster case that I -- it's been assigned to me.

Yes?

MS. KIMBALL: Is there a time for the March 19th hearing?

THE CLERK: 9:00 a.m.

THE COURT: 9:00, it's always at 9:00. And that's good for the lawyers who are in D.C. who might want to listen in and may not be here because their time is later, not earlier. It's rough when we get California lawyers. Or worse, lawyers from Hawaii. Or even worse, lawyers from Saipan or Guam. Believe it or not, I used to sit in Guam.

Oh, yeah, I had one from Germany, too. That was a whole 'nother story. I didn't go to Germany, but we had to work out a schedule so he wasn't in the middle of the night. I think six hours ahead, they are. Six hours ahead, I believe.

Okay. My friends from the press have got plenty of quotes today. I hope they don't misquote me.

I want to thank counsel, really. I do not believe that any lawyer walked away from the last hearing feeling that I had disrespected them or treated them unfairly, the one where it was suggested that I just rammed it down your throat.

Yes, I was pretty insistent on a trial date, because I

had heard from the State of Texas that they really wanted to move this case forward. And that's always been my experience with Texas. They don't like to sit on cases.

In fact, in another type of case, a water case I had, I mean, the -- Texas was the one that was really insistent on moving the case forward as quickly as possible.

Texas doesn't like to sit on their cases. And for that matter, neither does the United States. Governmental bodies are not my problem with lawyers sitting on cases.

And I am not going to ask you for a comment about whether you agree with me or not, because you've got all these judges that said I was very rude to the lawyers. And I don't want you to have to step on that, so I'll leave that as it is.

But I don't think I was rude. I think we were having a dialogue like we had today and everybody got a full and ample opportunity to be heard, just like you did today.

And after hearing both sides, understanding where you had the difficulties with your experts from both sides, I changed my view on a trial date, which is what a judge should do. A judge should be open to hearing argument and not making a ruling predicated on a predisposition as to the merits of anything before them. That just is wrong. I'm not a politician, I'm a judge.

I could have been a politician. I was asked. No thank you. Not here, by the way. In my previous life.

Okay. Anything else?

MS. KIMBALL: Not from us, your Honor. Thank you.

THE COURT: All right. Thank you so very much. I do appreciate it, and I guess the next time that I will see you will be on March the 19th for the hearing on the motions to -- State's motions to -- well, it's a motion, but you tried to dismiss the entire -- you're trying to dismiss the entire case.

Okay.

MR. BRYANT: Thank you, your Honor.

MR. STONE: Thank you, your Honor.

THE COURT: Thank you so much.

(10:08 a.m.)

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: February 28, 2024

/S/ Lisa A. Blanks

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